No. 187.

Brf. of Carlisle & Kern for Def. in Error.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD,
Plaintiff in Error,

against

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

J. G. CARLISLE,
For Defendant in Error.

J. W. KERN,
Of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD,
Plaintiff in Error,

AGAINST

EDWARD HAWKINS, Receiver of the Indianapolis National Bank,
Defendant in Error.

Brief for Defendant in Error.

This writ of error is prosecuted to reverse a judgment of the United States Circuit Court of Appeals, for the First Circuit, affirming a judgment of the Circuit Court of the United States against the plaintiff in error, for the sum of $11,646.67 and costs. The only question in the case is, whether the Concord National Bank is liable, under the statute, for an assessment made against it by the Comptroller of the currency, as a shareholder in the failed National Bank of Indianapolis. The court below found and certified the following facts:

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and

qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the Comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis National Bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis Bank prior to July, 1893. The defendant has not paid said assessment or any part thereof."

After the judgment in the Circuit Court of Appeals this court decided the case of California National Bank *vs.* Kennedy, 167 U. S., 362, whereupon the plaintiff in error presented a petition for a rehearing, but it was denied for the reasons stated by Judge Putnam in the second Opinion, printed in the appendix hereto.

We insist for the defendant in error that under the National Bank Act the persons, except fiduciaries, in whose names the certificates of shares stand on the register, are liable as stockholders to an assessment for the payment of the debts of a failed association, no matter how the ownership or possession of the shares was acquired, and that this liability is not contractual but statutory. In the Kennedy

case the question as to the liability of one national bank on account of shares standing in its name on the records of another national bank was not involved, and therefore the act of Congress imposing the liability in such cases was not construed or applied by the court. The savings bank in which the national bank had acquired stock in that case was organized under the laws of California, and the only questions decided by this court were that the national bank possessed no legal authority or to acquire or become the owner of the shares by contract, and that, not having such authority, it could not be made liable on its attempted contract of purchase nor by estoppal arising from the mere fact that it had participated in the dividends. All this may be conceded without in the least affecting the real question in the present case, as we understand it.

The National Bank Act was intended to create a distinct currency and banking system and surround it with every possible safeguard for the security of note holders and depositors and other creditors, and in construing its provisions this paramount purpose cannot be properly disregarded. It would be tedious to enumerate all the requirements, prohibitions and regulations embodied in the law with a view of protecting those who deal with these institutions against loss, and it is not necessary to attempt to do so, as this court has been frequently called upon to consider them. Among other things it is provided (§ 5139) that the capital stock of each association shall be divided into shares of one hundred dollars each and shall be deemed personal property, and transferable on the books of the association, and that "every person becoming a shareholder *by such transfer* shall, in proportion to his shares, succeed to all the rights and *liabilities* of the *prior holder* of such shares." Section 5151 makes the shareholders individually responsible "equally and rateably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the

amount of their stock at the par value thereof, in addition to the sum invested in such shares;" and in order that persons giving credit to the association may know who are ultimately responsible for its obligations, section 5210 requires the president and cashier of every such association to cause to be kept at all times, in the office where its business is transacted, a full list of the names and residences of all the shareholders and the number of shares held by each. This list is to be at all times during business hours subject to the inspection of shareholders and creditors of the association. The name of the plaintiff in error, as the holder of one hundred shares of stock, appeared on this list from May, 1889, until the appointment of the receiver, and it participated in all the dividends declared during that time. The other shareholders and creditors could not know whether those shares had been acquired by purchase in the market as an investment of surplus funds, or in a lawful manner in the regular course of its business; and there is nothing in the statute which requires them to investigate that question. The list as it stands at the time of the failure of the association was intended by the statute to be conclusive evidence of the liability of the persons whose names appeared on it, no matter how they had acquired the shares. Any other construction of the statute would make it incumbent not only on other shareholders and the creditors, but upon the Comptroller of the currency, before making an assessment, to ascertain in what manner each shareholder appearing on the list had acquired the shares held by him, and whether or not he had made such a contract with the party from whom he acquired them, as would make him the *bona fide* and lawful owner of the stock.

The object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and this object would be defeated in a great many cases if the Comptroller is obliged to

inquire into the validity of all the contracts by which the registered shareholders acquired their respective interests. Such a rule would produce great inconvenience, uncertainty and delay in winding up the affairs of insolvent banks, and unless there is some conclusive reason for its application, it ought not to receive the sanction of the courts. One of the most beneficial provisions of the national banking law, so far as it provides for the liquidation of insolvent associations, is that which authorizes the Comptroller to make assessments upon the shareholders to pay the debts, and this court, recognizing the policy of the law in this respect, has decided that an assessment made for that purpose is conclusive both as to the necessity for making it and as to the amount of each shareholders' liability Kennedy *vs.* Gibson, 8 Wall., 498; Casey *vs.* Galli, 94 U. S., 673; Same *vs.* Same, 94 U. S., 680; Germania Bank *vs.* Case, 99 U. S., 628.

It was said by the court in White *vs.* Dowley, 94 U. S., 527, that the list of stockho'ders which the law requires to be kept posted in the bank "was designed to furnish to the public dealing with the bank a knowledge of the names of its incorporators and to what extent they might be relied on as giving safety to those dealing with the bank." National banks are not expressly prohibited by the law from acquiring or holding shares of stock in other corporations, but, on the contrary are permitted to do so under certain circumstances, as this court has frequently decided. See Bank of California *vs.* Kennedy, 167 U. S., 362. When its name appears as a shareholder on the books of another national banking association as required by law, how are the persons dealing with and giving credit to that association to know that the shares have not been acquired in a lawful manner? How is the Comptroller of the currency to know when he finds it necessary to make an assessment, that the national bank whose name appears as a shareholder did not acquire the stock in the regular course of its business as collateral secur-

ity for a loan, or by some other means in strict conformity with the law? In the absence of evidence to the contrary, the presumption is, of course, that the shares were lawfully acquired, and this presumption is, we think, made conclusive by the terms of the statute, especially in a case where the bank in whose name the shares appear has made no attempt to repudiate the ownership or liability until after the failure of the other institution, and after the statutory rights of creditors have accrued.

If a pledgee or trustee has the shares transferred to him, and his name appears on the books as a pledgee or trustee, he is not personally liable for an assessment, because the record itself is notice to the public that he is not the real and beneficial owner; but if they are transferred to him and his name appears without anything to show the purpose for which he holds them or the capacity in which he holds them, he is liable, because the public is bound to presume that he holds in his own right as absolute owner, and because the law declares that, "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." The prior holder of the shares which were transferred to the plaintiff in error was undoubtedly liable to an assessment if the failure had occurred before the transfer, or at least there if nothing in the case conducing to show that he was not liable. He sold the shares and was paid for them; they were regularly transferred to the purchaser, who took his place on the books of the bank, and he had from that time no further interest in them or claim upon them. He did not make a fraudulent transfer for the purpose of evading liability, nor could he have rescinded the contract after it was completed upon the ground that his vendee had no capacity to make the purchase. No court can now rescind the contract, and restore the shares to the prior holder, and thus render him liable for the assessment. He is therefore fully and finally re-

leased from any liability of any nature for or on account of this one hundred shares of stock. It is evident then that unless the transferee has taken his place, one hundred shares of the capital stock of the Indianapolis National Bank have been totally extinguished, so far as they constituted a part of the security expressly provided by law for the benefit of the creditors of that institution. If they were legally extinguished when the transfer was made to the plaintiff in error, of course the capital stock of the Indianapolis Bank was legally reduced to that extent at the very momemt of the transfer. But the law specifically provides the only manner in which the capital stock of these institutions can be reduced, and by that method of reduction publicity is given to the fact in order that all who deal with the association may know that the security has been diminished. Revised Statutes, § 5143. We do not think these shares have been extinguished. The plaintiff in error agreed to purchase them, paid for them out of its surplus earnings, took possession of them, had them transferred on the books, paid taxes on them and received dividends on them for several years. The legal and equitable title to the shares must be vested somewhere, and unless the National Banking Act has failed to accomplish its purpose in a very important particular, the liability attached to them must exist somewhere.

If the First National Bank of Concord had failed, would not these shares have been assets in the hands of its receiver to be sold by him and converted into money the same as other assets? Would not his sale and transfer have invested the purchaser with a good title, and would he not have become liable for an assessment? Or, if the Concord National Bank had itself sold and transferred the shares at any time before the institution of this action, and the name of the purchaser had appeared on the books of the defendant in error, would he not have acquired a good title and been liable for

an assessment? Would he not have been liable for an assessment whether he acquired a good title or not, if the shares had been transferred to him, and his name appeared on the books? We submit that these questions cannot be correctly answered without assuming, as a legal proposition, that the shares are now, and always have been, in existence, and that the statutory liability is now, and always has been, attached to them in the hands of every actual holder, provided they were transferred to him and his name appeared as a shareholder upon the books of the association which issued the stock. When these things have been done, we do not think that the Comptroller of the currency, or any creditor, or any court, is required by the law to investigate the question of title and determine whether or not the actual holder of the shares is the actual legal owner, or to take any notice of the contract, or form of contract, by which he became the holder or had the transfer made. He may have procured them from the real owner by force or fraud, or from a lunatic or idiot by a void contract, and still he would be liable for an assessment under the statute, if he continued to be the actual holder of the shares, and nobody else appears on the books as their owner. When assessments are made and sued upon both parties to the contract or alleged contract under which the transfer was made are not before the court, and it cannot, therefore, undertake to determine the question of legal title and enforce the liability against the real debtor. It can look only to the record which the parties themselves have made in compliance with the statute and leave the responsibility where the statute places it.

It is not necessary to discuss in this case the general doctrine of legal or equitable estoppel in its application to *ultra vires* contracts. The decisions cited in the case of California Bank *vs.* Kennedy, 167 U. S. 362, in support of the proposition that a corporation is not estopped to assert the nullity of such a contract, are not applicable here, because we are

not insisting upon an estoppel arising from a contract or attempted contract, but upon an express provision of the statute imposing the liability. The case of McCormick *vs.* Market Bank, 165 U. S., 538, was the only one cited which related to the powers of national banks, and that was an ordinary instance of an *ultra vires* contract, and did not involve any question of statutory liability.

In Anderson *vs.* Philadelphia Warehouse Co., 111 U. S., 479, Mr. Chief Justice Waite, speaking for the Court, said: "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors *as a stockholder*, whether he be the absolute owner or a pledgee only, and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors." National Bank *vs.* Case, 99 U. S., 628; Bowden *vs.* Johnson, 107 U. S., 251. But in the case from which this extract is taken the name of the pledgee did not appear on the books of the bank and it had exercised none of the powers or rights of a stockholder, and the court therefore held that it was not liable for an assessment. In National Bank *vs.* Case, 99 U. S., 628, the name of the pledgee, which was a national bank, had appeared on the books of the bank in which the stock was held, but an attempt had been made to transfer it to another party. The court said:

"It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors * * * For this, several reasons are given. *One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock*, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title *he has released the former owner;* and a third is, that after

having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibility of a stockholder."

Numerous authorities were cited in support of those propositions, and the court continued, "When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability occurred the instant the transfer was made. At that instant the liability of Phelps, McCulough & Co. ceased." For other cases bearing upon this question see Pullman *vs.* Upton, 96 U. S., 628; Sanger *vs.* Upton, 91 U. S., 56; Upton *vs.* Tribilcock, *Id.*, 45: Webster *vs.* Upton, *Id.*, 65. In Casey *vs.* Galli, 94 U. S., 673, the court, speaking of persons in whose names the shares appeared on the books of the bank, said:

"Parties must take the consequence of the position they assume. They are estopped to deny the reality of the state of things which they have made to appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real and the law properly so regards it."

In the present case not only sound ethics, but, as we think, the express language of the act of Congress imposing the liability on the party to whom the shares are transferred on the books of the bank, estop the plaintiff in error to deny its obligation to pay the amount and thus deprive the creditors of the failed bank of a security which the law clearly intended to afford them. A question somewhat analogous to the one here presented arose and was decided in Bank of Redemption *vs.* Boston, 125 U. S., 60. Under the laws of Massachusetts a tax was imposed upon the shares of stock in banks, and it was provided that if the tax should not be paid, the bank should be liable for

it. The Bank of Redemption paid the tax and brought an action to recover it back, and among the grounds relied upon to maintain the claim it was alleged that 1,448 shares of the stock upon which the tax had been collected were held by other national banks; but this court said:

The manifest intention of the law is to permit the State in which a national bank is located, to tax, subject to the limitations prescribed, all the shares of its capital stock—without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank, by reason of that ownership, on the same footing with all other shares."

The court evidently did not think that the shares had been extinguished simply because they were held by corporations not authorized by law to purchase and own them. The case of Robinson *vs.* Turrentine, 59 Fed., 554, expressly decided the very point now under consideration. The case arose in North Carolina, and the question was whether a married woman in whose name shares of stock appeared on the books of a national bank was liable to an assessment, notwithstanding the laws of that State did not permit her to make a valid contract without the consent of her husband.

The court said:

"The liability of a married woman for an assessment upon national bank stock, while it in no wise grows out of a contract, is one of the class of liabilities which may be enforced in an action in form *ex contractu*, and this fact is one which has often in analogous cases caused confusion in minds accustomed only to the ideas of the common law. The liability of an infant or an insane person for necessaries has often been called a liability arising *ex contractu*, solely by reason of the form of the action to enforce it. So of a suit for a statutory penalty. * * * The liability of the defendant here is *quasi-contractual;* is treated for certain purposes growing out of the limitations of ancient forms of action as contractual; *but it does not arise from a*

contract, and is not affected by the Act of 1871-2, *supra* (the North Carolina Statute)."

See Welles *vs.* Larrabee, 36 Fed., 866; also Witters *vs.* Somers, 32 Fed., 767, which decides that the liability is not contractual but statutory.

In Pauly *vs.* State Loan and Trust Company, 165 U. S., 606, Mr. Justice Harlan, in delivering the unanimous opinion of the court, said: "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that, by allowing his name to appear upon the stock list as owner, he represents that he is such owner, and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the persons assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value." In that case the previous decisions of this court bearing upon the question of a shareholder's liability to the creditors of a failed national bank were reviewed, and it was stated as one of the rules deducible from them: "That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way *as to imply that the pledgee is the real owner*, then the pledgee may be treated *as a shareholder* within the meaning of Section 5151 of the Revised Statutes of the United States, and, therefore, liable upon the basis prescribed by that section for the contracts, debts and engagements of the association," See p. 619.

The Pauly case, which was decided March 1, 1897, directly involved the question of a shareholder's liability under the statute, while the California Bank case, which was decided May 24, 1897, involved no such question. There is no real or apparent conflict between the two cases, and in the latter case the court did not comment upon or even refer to the former case.

Including the case at bar, three decisions have been rendered by United States Circuit Courts of Appeal on the liability of corporations as shareholders in the Indianapolis National Bank, and in every case the assessment has been sustained. In Citizen's State Bank of Noblesville *vs.* Hawkins, 71 Fed., 369, and Cooper Ins. Co. *vs.* Hawkins, *Id.*, 373, the liability was enforced upon the grounds that the corporations had the power under certain circumstances, and for certain purposes, to acquire stock in a national bank; that the shares had been purchased from a third party and transferred upon the books of the association; and that the acquisition being within the scope of the general powers of the corporations, it was not the case of the exercise of a power not in any event given, but an abuse of a general power, a wrongful exercise of conferred power, which the public authorities alone could deal with. In the case at bar it was contended in the court below that the liability sought to be enforced was merely contractual, and that if the original purchase was unauthorized the action could not be maintained. The court, however, said: "This does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises by force of the statute, and is not contractual. Keyser *v.* Hitz, 133 U. S., 138, 151." We think this view of the case was clearly correct. Un-

doubtedly it was the legal duty of the Comptroller of the currency to make an assessment upon *all the shares* of the Indianapolis National Bank in order to raise money for the payment of its debts. An assessment upon these one hundred shares could not be made against any one except the plaintiff in error, for no one else held or claimed them. They had been transferred to it and stood in its name as the absolute owner on the books of the other bank; they had not been, and could not be, extinguished; the whole amount of the capital stock—that is, all the shares of stock issued and outstanding, as shown by the books—constituted the basis of the security provided by the statute for the benefit of creditors, and all the holders of such shares are placed upon a footing of perfect equality by the express provisions of the law. Under such circumstances it seems impossible to escape the conclusion that the plaintiff in error is liable for the assessment sued on.

If national banks are encouraged to invest their capital or their surplus funds in the shares of other associations by such a construction of the statute as will enable them to enjoy all the benefits of shareholders without incurring any of their liabilities, not only will great injustice be done in many cases, but the policy of the law itself will be defeated. If, on the other hand, the statutory liability is enforced against all the registered holders of shares, without discrimination in favor of the banks, the temptation to make such unauthorized investments will not exist, additional security will be afforded to the creditors of insolvent associations, and the policy of the law will be supported and carried out.

An affirmance is respectfully asked.

J. G. CARLISLE,
For Defendant in Error.

J. W. KERN,
Of Counsel.

APPENDIX.

BEFORE COLT, PUTNAM AND WEBB, *JJ.*

OPINION OF THE COURT.

MARCH 5, 1897.

PUTNAM, *J.*—This case is based by the plaintiff in error on the proposition that it had no power under the law of its creation to acquire the stock of another national bank as an investment. It is not necessary for us to consider this proposition. It is settled that it had full power to loan on the stock as collateral, or to have taken it in settlement of a doubtful debt, and in either case, as incidental thereto, to cause the stock to be transferred into its own name absolutely if it deemed it for its interest so to do (*First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 92 U. S., 122; *National Bank* v. *Case*, 99 U. S., 628). Therefore, on the face of the transaction, no illegality appeared, and nothing to advise, either the bank whose stock it acquired, or the existing or future creditors of that bank, or the Comptroller of the Currency, who was their *quasi* public representative, that the transaction was not within the scope of the unquestionable powers of the plaintiff in error.

Under these circumstances the entire trend of the law is that the plaintiff in error is estopped to deny its liability in this case (*Chubb* v. *Upton*, 95 U. S., 665; *Pullman* v. *Upton*, 96 U. S., 328, 330; *National Bank* v. *Case*, 99 U. S., 628; *Scovill* v. *Thayer*, 105 U. S., 143, 149; *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S., 479, 483). There might arise some exceptional instances where, for special reasons, this estoppel would not apply; as where stock had been issued in excess of the authorized limit (*Scovill* v. *Thayer, ubi supra*), or where, in the cases represented by Section 5152 of the Revised Statutes, there are no interests capable of binding themselves either by contract or estoppel, or where

the substance of the transaction appears on its face, as in *Beal* v. *Essex Savings Bank*, decided by us and reported in 67 Fed. Rep, 816; although the latter class is not strictly exceptional. But none of those special elements are found here. We have no need to reconcile *Burgess* v. *Seligman*, 107 U. S., 20, which arose on a statute of Missouri, as the decisions referred to by us apply directly to national banks, and come down to a later date.

The plaintiff in error maintains that the liability sought to be enforced here is merely contractual, flowing out of the acquisition of the stock in question and continuous upon it; so that, therefore, if the original investment was unauthorized, the liability, being still *in fieri*, cannot be enforced. But this does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and that no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises by force of the statute, and is not contractual (*Keyser* v. *Hitz*, 133 U. S., 138, 151).

Indeed the expressions of the Supreme Court found in *National Bank* v. *Case*, *ubi supra*, are so much in harmony with the rules deducible from its practical conclusions in the cases to which we have referred, that we accept them as disposing of this case. The Court said, at page 633:

"There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from an illegal action."

The judgment of the Circuit Court is affirmed, with interest, and with the costs of this court to the defendant in error.

BEFORE COLT, PUTNAM AND WEBB, *JJ.*

OPINION OF THE COURT.

JULY 20, 1897.

PUTNAM, *J.*—The plaintiff in error has filed a petition for a rehearing, resting on California Bank *v.* Kennedy, 167 U. S., 362, which was decided a few days after our decision in this case. The issue considered by the Supreme Court was the liability of a national bank as a stockholder in a State savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the Supreme Court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions which we understood to bind us in the case at bar were not particularly noticed by it. Therefore, it does not follow beyond question that California Bank *v.* Kennedy is decisive of the case at bar.

Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied.

Petition for rehearing denied; mandate to stay until further order.